

Planning and Implementation

TOPIC: Civil and Criminal Liability for Fire Management Decisions (Unit 10)

SUGGESTED TIME: 2 hours

TRAINING AIDS: Overhead projector and transparencies (optional), VCR & video tape (Legal Considerations in Fire Management), Instructor Reference - Legal Implications Associated with Use and Control of Fire as a Management Practice. (David H. White), Handout - arguments to hypotheticals, Video projection system for PowerPoint presentation

INSTRUCTOR NOTES:

It is very helpful to have an attorney or an individual very knowledgeable of the legal system instruct this section. These individuals are available in every geographic area. Contact your Regional Fire Management Coordinator or the National Fire Training Specialist for suggested names of individuals.

The best way to present this unit has been with opening discussion from the attorney or legal expert, followed by a question and answer period. An attorney who has some knowledge of fire management case law is extremely helpful. There is a video tape available called Legal Considerations in Fire Management, but it is of poor quality, and it is not recommended for use until it can be redone.

You may be asked about personal liability insurance for Refuge Managers and Burn Bosses. **Attorneys who have taught this session previously have said that the message to convey is that if you have operated within the scope of your duty and in a non-negligent manner, your agency should stand behind you. If you have not, your insurance carrier probably won't support you either.** Read the small print in any contract for liability insurance. Generally it is not considered necessary for most employees.

Emphasize ways to protect managers from liability, i.e. have a good, updated Fire Management Plan and prescribed burn plans and follow them; involve the public in decisions and keep them informed; interdisciplinary staff meetings; weigh policy decisions, and ensure employees are working within the bounds of their employment.

Portions of this lesson were taken from a presentation by Jim Sutherland, Asst. U. S. Attorney, in April of 1991 to a National Park Service audience of Line Officers (Fire Management for Managers).

Suggested Outline

I. Objectives

- A. Describe the extent and conditions of personal (civil) liability of the Government.
- B. Describe the extent and conditions of personal liability (civil) of Government employees.
- C. Describe the conditions under which government employees may be held criminally liable for their actions.
- D. Discuss the importance of proper documentation.
- E. Discuss what is meant by the affirmative obligation to use prescribed fire.

II. INTRODUCTION: THE LAW

- A. Where is the statutory and regulatory authority to suppress fires and conduct burns?

The authorities are contained in Part 620, Chapter 1, of the Department of the Interior, Department Manual (DM). For Alaska, the authority is found in Chapter 2, General Policy and Procedures-Alaska (or written as 620 DM 2).

- B. Damages: Some feel the United States is the ultimate “deep pocket”.

- 1. *Property Damage*--Destruction of trees, equipment, cabins, and other personal property.
- 2. *Personal Injury*--Pain and suffering, special damages (medical and lost income), loss of future income.

- C. Suppression Costs:

- 1. What is recoverable? Wages of full-time employees, wages of temporaries, equipment, air attack, overhead.
- 2. Recovery from third parties, i.e., loggers, tourists, farmers, or their insurance carrier.

3. Payment to third party, i.e., state agency pursuant to a cooperative agreement.

III. Personal Liability of Government Employees

A. Immunity

1. Recent federal legislation gives qualified immunity to government employees.
2. Federal employees acting within the scope of their duties are not personally liable for damages resulting from their negligent acts.

B. Deep Pocket

Even without the statutory exemption, government employees are often effectively immune from personal liability because of limited assets. Plaintiffs want the government "deep pocket."

IV. Liability of the United States Government

- A. Government is immune from civil liability except to the extent it consents to a suit. Passage of Federal Torts Claim Act (FTCA) in 1946, is a waiver of immunity and a consent to sue within certain limitations.

The United States is liable:

1. For negligent and wrongful acts.
 2. For employees acting within scope of their employment.
 3. To the same extent as a private person.
 4. According to the law of the state where the injury occurred.
 - a. This varies from state to state; therefore, this discussion is of a general nature.
- B. The *discretionary function exception* is an important limitation. It says FTCA is not applicable and government immunity is retained for governmental conduct involving discretionary functions or duties. The following principles offer guidance in defining discretionary functions.

1. Separation of Powers.

Fundamental policy behind the exception is that the judiciary should not control **activities that are primarily legislative or executive in nature**. That violates the basic constitutional principles of separation of powers. Therefore, ask the question: *Is this governmental activity the kind that should be free from judicial review, i.e., legislative or executive in nature?*

2. *Does the activity involve policy judgment?* Government conduct involving policy judgment should be free from judicial review because it is legislative in nature. Decisions made at the planning level as opposed to the operational level of government may be equated with policy judgment.
3. *Is the decision or activity merely operational?* Specific acts of negligence are often clearly "operational."
4. *Does the activity involve negligent application of a policy judgment?* The government is liable for the negligent execution or application of policy or planning decisions that are otherwise protected by immunity.

National FWS prescribed fire data suggest that we have made little improvement in preventing escaped fires. In reviewing some incidents and from anecdotal reports it appears that there was **ONE** overriding problem:

THE PRESCRIBED FIRE PLAN OR SERVICE POLICY WAS NOT BEING FOLLOWED!

Some possible reasons for the escapes include: unit out of prescription; too few people - all people indicated in the plan were not present; use of unqualified people, etc. In light of the previous discussion, consider the possible legal ramifications of some of these actions. The take home lesson here is FOLLOW THE PLAN!

- Ask yourself, Did you have a plan? Was it a good plan? Did I follow the plan?

C. Negligent Action.

If government conduct does not fall within the discretionary function exception or other undiscussed limitations, then the government can be sued through the FTCA. Under the FTCA, liability exists when government

employees, functioning within the scope of their duty, act negligently, as prescribed by the law of the state where the act or injury occurred.

1. a. Duty.

It is the duty of every person to use reasonable care to avoid injury to the plaintiff in any situation in which one could reasonable anticipate or foresee that the failure to use such care may result in injury to the class of persons of which plaintiff is a member.

Congress has not waived immunity for negligent acts committed by government employees acting outside the scope of their duty. Government employees could be personally liable for their personal acts that are not within their scope of duty.

b. Negligent acts---What are they?

- i) FTCA waiver of immunity does not extend to reckless or intentional conduct of employees. Further, employees may be personally liable for reckless or intentional acts.
- ii) Whether or not employee conduct is negligent is determined by the applicable law of the state where the act or injury occurred. Some variation does exist from state to state. Therefore, negligence is discussed below in only general terms.

2. Breach of duty.

Negligence standard of care: "What a reasonable and prudent person would do under the circumstances." A person is negligent when that person fails to act as a reasonably prudent person under the circumstances.

a. Overview: This is a two-fold injury:

- (1) Should the person have reasonably foreseen that his or her conduct subjected the injured party (or members of that class to which plaintiff belongs) to an unreasonable risk of harm of the kind which plaintiff suffered? (SHOULD THAT PERSON HAVE KNOWN?)
- (2) Given the risk of harm to plaintiff which the defendant should have foreseen, did the defendant's conduct measure up to the standard of care exercised by a reasonable prudent person

acting under like circumstance? This is generally a jury question. In each case, the standard of care remains the same. (IF THAT PERSON KNEW, DID HE TAKE APPROPRIATE CARE?)

b. Professional Standard of Care:

A professional is held both to what he/she actually knows and what a prudent professional should know; i.e., a Refuge Manager is not held to a standard of a reasonable person under the circumstances, but to a reasonable Refuge Manager under the circumstances. In other words, a Refuge Manager is not held to a general knowledge standard, but to a level of knowledge of what a Refuge Manager is expected to know.

Accordingly, a Refuge Manager is required to keep reasonably abreast of current advances in the field. Hence, training and currency of skills is important, especially for Fire Management Officers and Burn Bosses.

(2) Novice/Expert

A novice is required to exercise the level of skill possessed by a reasonable prudent professional -- **a novice or beginner is held to the standard of a reasonable professional, which may require more skill than the novice actually possesses.** However, a professional with extensive training and experience is held to a standard of a reasonable professional with like training and experience.

C. Degree of Care

The standard is always reasonableness under the circumstances; a person is not required to be more than reasonable under the circumstances. However, what conduct is reasonable changes as circumstances change. **Generally, as the likelihood for harm and/or seriousness of the potential injury increase, the amount of care necessary to be reasonable under the circumstances increases.** Because fire is a hazardous operation, a greater standard of care is called for.

(1) Example:

The care required in burning and mopping up a fire may be different in March as compared to August.

- (2) Sudden emergencies are factored into the reasonableness test. "Detached reflection is not required in the face of an upheld knife." But if the defendant created the emergency, even reasonableness under the circumstances is not enough.

- (3) Perfection

An individual need not be perfect. The requirement is reasonableness under the circumstances, not perfection. Mistakes are acceptable if a reasonable person would make that mistake under the circumstances.

3. Causation and fact.

The actor's action "must be a substantial factor." There is an additional problem if you have joint (two or more) tortfeasors. In this case, the liability may be joint or severable, the problem is who has the deep pocket.

4. Injury and damages.

- a. If there are no damages, there is no recovery. The measure of damage for personal property is the difference in the value of the property just before the accident and its value immediately after the accident. This may or may not be the cost to repair. Cost of repair may not take into account depreciation or appreciation of property.
- b. Personal injuries. Damages recoverable for pain and suffering. Some states have set limits on pain and suffering.

- (1) Loss of past income.

- (2) Loss of ability to earn in the future.

5. Examples of negligence in the use of fire

- Intentionally setting a fire during hazardous conditions such as high winds or low RH
- Failure to control an otherwise lawful fire, e.g. not having enough people or equipment available to properly maintain the scope or intensity of the burn, or failure to completely extinguish or completely monitor the fire

D. Criminal Liability

Criminal conduct requires BOTH a guilty act (actus reus) and a guilty mind (mens rea). Therefore, criminal liability exists when the defendant's conduct is accompanied by the necessary criminal intent. Government employees will be criminally liable for their acts only when there is demonstrated criminal intent.

Some crimes are based on criminal negligence and not reckless or intentional criminal conduct. But even criminal negligence generally requires a "gross deviation" from the standard of care a reasonable person would observe.

For example, if you show up at a prescribed burn operation and you are intoxicated, and you start a fire that gets away and burns down the neighbors barn. You could be found negligent. In this example, agency discipline would likely come before any criminal prosecution was carried out.

V. DEFENSES - LIMITS OR DEFEATS RECOVERY

A. Contributory Negligence.

There are different rules for different states. Some states have established a system such as the state of Oregon. If the plaintiff is more than 50% negligent, recovery is diminished by the percentage of the negligence. In California, the plaintiff's recovery is reduced by the amount of negligence without regard to the 50% figure.

Any time private property is damaged, investigate the possibility that the plaintiff was negligent. The policy of investigating fire cause is important.

B. No duty.

Sometimes it is argued that the government had no duty to the plaintiff. This is a very difficult offense. Frequently it may be that there was no duty in the first instance, but if the government assumes the responsibility, there may be liability. Once the government assumes responsibility, they must do it in a non-negligent manner. This is called the Good Samaritan rule. Classic examples are lighthouses and FAA.

C. Independent contractor.

Generally, a defendant is not liable for the acts of an independent contractor. This is particularly true of the government. The exception to the rule is that if

the activity was inherently dangerous, then it is considered "non-delegable" and the employer may be responsible.

In cases involving prescribed burns, it is safer for the government to require an independent contractor to conduct the burn. If the agency is careful, you can include an indemnity paragraph that would make the contractor responsible for all damages regardless of whose fault. This provision is not meaningful unless adequate insurance coverage is required.

VI. Let's briefly discuss Fire Suppression.

A. Duty.

Is there a duty on behalf of the government to fight a fire? The answer is probably not to the extent that the fire fighting activities are organized to protect its own land. The problem is that once you assume the responsibility of fighting a fire, you must do it in a non-negligent manner, i.e., the Good Samaritan doctrine.

B. Contributory Negligence.

In lawsuits involving fire suppression, this is frequently raised. Did the United States have the proper and necessary equipment or manpower available: did the United States wait too long to start its fire suppression activities?

C. State Statutory Provisions for Use and Control of Fire

1. Regulations run the gamut from simple notification or permitting to strict prescription requirements. You should become intimately familiar with your state statutes.
3. Acts or omissions which violate any substantive provisions of state statutes may constitute negligence per se. Additionally, statutes may be construed to create strict liability, regardless of fault, for failure to control otherwise legal fires (prescribed fires).

E. CASE STUDY

1. The Three Horn Fire.

The Forest Service sold a timber sale. In the original contract, the contractor was responsible for slash burning. The Forest Service made a decision that they needed the land for an experimental plantation. They then "agreed" to conduct a slash burn.

The burning was done in July. The Forest Service's burn plan was a standard "cut and paste" from a sample burn plan, however, there were some internal inconsistencies in the plan. The plan required that certain conditions exist before burning, i.e., time of day, humidity and wind speed. No records were kept of whether or not these conditions were met. The mop-up was very thorough. There was a hoseline throughout the burn, and the piles were hand-mopped. The Forest Service also used a probeye (heat sensor) to detect heat sources. The problem was that no one made a record of what piles were mopped up at what period of time. No photos were taken. The mop up patrols during August were sporadic and not documented. Thirty days after the slash burn, the unit rekindled and caught fire. The fire started on Forest Service land just north of the previously burned piles. The issues were:

- a. Did the fire start from a Forest Service burn?
- b. Was the Forest Service negligent in its burning or mopping up practices?
- c. What were the damages of the plaintiff?

VII. PRESCRIBED FIRE

A. Affirmative Obligations

In some cases, you may have an affirmative obligation to use prescribed fire. The prescribed burn involves issues of policy, planning, operation, supervision and responsibility. Two central issues are:

1. Hazard Fuels

Excessive accumulation of fuels causes a hazard to neighbors.

Landowners have been found negligent for allowing dangerously high levels of fuel (slash/debris) to accumulate on their property. The following cases support the common law rule regarding the liability of the landowner

- *United States vs. Denver and Rio Grande Western R. Co.*
fuel accumulation along a railroad right-of way
- *Arneil vs. Schnitzer*
accumulation of debris around a sawmill

2. Endangered Species Act (ESA)

The ESA may create an affirmative obligation to use prescribed fire for the maintenance of habitat for endangered plants and animals on federal lands or those lands influenced by federal actions.

Case: *Sierra Club vs. Lyng*: re: Red-cockaded woodpecker habitat management on USFS lands in Texas and the failure of the USFS to aggressively use prescribed fire to maintain critical habitat. USFS was ordered by the court to implement an aggressive prescribed fire program.

B. Smoke Hazards

There is a dearth of case law relating to smoke hazards. Because of the necessarily interrelated nature of smoke and fire it would appear that the same rationale for liability that applies to use of fire also applies to smoke hazards.

In previous courses, questions came up about liability because of smoke generated by prescribed burns. You now have the necessary questions in order to answer smoke management liability questions.

- Who was responsible?
- Are they government employees?
- Were they acting within the scope of their duty?
- Were they negligent (as opposed to intent or recklessness)?
- Did they act reasonable under the circumstances?

VIII. LITIGATION

How many have ever been involved in litigation? Understand litigation? Enjoyed litigation?

Some important points to keep in mind which can assist the attorney working with your case are:

Note: The video *Legal considerations in Fire Management* addresses this section. You may want to use a portion of the video to support this section.

A. Freedom of Information Requests (FOIA).

If you get a FOIA request after a fire, you can expect litigation. The lawyers have discovered that this is a back door way of obtaining information and

documents to assist them in a lawsuit before they actually make the claim with the agency or file a complaint.

The problem is that the people who make the decisions as to what should or should not be disclosed are not the people involved or particularly sensitive to litigation. There are cases where the opponent has had more material than your attorney has gotten from the agency because of their FOIA request.

B. Deposition/Interrogatories

Each side is entitled to question the other's employees before a court reporter and under oath. In cases tried in court, it is common to give the judge the complete deposition to read. The difficulty in fire cases is that you will have 20 people who saw 20 different places, each with a different vision of the fire. After you've talked to everyone you may not be certain that everyone saw the same fire.

C. Documentation

Most problems occur on refuges with low fire activity. Refuges with high fire activity are accustomed to the routine of prescribed burns, initial attack and extended attack activities. Documentation becomes second nature.

When litigation does come up, it is often one to two years after the initial date. Without complete and proper documentation, could you as a line officer, or your employees, recall the particulars that led up the event or events in question?

The message of this talk is that you need to document each step, each decision, and each action in conducting a prescribed burn or supervising a wildfire. Litigation typically is two to six years after the event. Memories fade, witnesses disappear. Memories become colored by intervening experiences and self-interest.

The litigator needs to know who, what, when, where, and why each event occurred. How was the policy to do prescribed burns made? Who made the policy for prescribed burns? From whom to whom was it delegated? When, how and who made the specific decision to burn a particular parcel? Who was responsible for the preparation of the burn plan? What documentation was made during the burn and the mop-up stage? Did the documentation include fire investigation if there was an escape? What happened to the suppression of the fire?

D. Fire suppression cases.

You need documents and witness statements as to: (a) who and when the first fire was seen; (b) who were the attack crews; (c) why the attack activity took place; (d) who made the decision to bring in overhead teams and order the other resources? What was the documentation supporting the actual costs involved in fighting a fire?

E. You have to remember that whatever you do, you will be second-guessed.

F. What does your attorney need?

1. Education. The agency needs to educate the trial lawyer. The trial lawyer needs to educate the judge, and hopefully the other side.

2. Evidence

a. Photographs of everything at all times.

b. Fact witnesses. Get signed witness statements.

c. Documents documenting every step of the process.

d. Expert witnesses.

- Fire origin.
- Standard of care.
- Fire behavior.
- Damages.

IX. CONCLUSION

A trial is in essence a search to find the truth. In reality, a trial rewrites history. The object of the trial is to rewrite the history as accurately as possible. A lawyer is no better than his facts. (U.S. Attorney - Jim Sutherland)

X. Wrap-up - Questions?